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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/036,990	12/31/2001	Ronald L. Edens	17,694	5317

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KIMBERLY-CLARK WORLDWIDE, INC.
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EXAMINER

REICHL, KARIN M

ART UNIT

PAPER NUMBER

3761

15

DATE MAILED: 02/23/2004

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary

Application No.

10/036,990

Applicant(s)

EDENS ET AL.

Examiner

Karin M. Reichle

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(e). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 24 November 2003.
- 2a) ☒ This action is FINAL. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-4, 7, 8, 10-15, 18, 19, 23-27, 30, 31, 33 and 34 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1-4, 7, 8, 10-15, 18, 19, 23-27, 30, 31, 33 and 34 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☒ The drawing(s) filed on 24 November 2003 is/are: a) ☐ accepted or b) ☒ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
 - ☐ Certified copies of the priority documents have been received in Application No. _____.
 - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- * See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- ☐ Notice of References Cited (PTO-892)
- ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- ☒ Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)
Paper No(s)/Mail Date 10-12.
- ☐ Interview Summary (PTO-413)
Paper No(s)/Mail Date. _____.
- ☐ Notice of Informal Patent Application (PTO-152)
- ☐ Other: _____.

DETAILED ACTION

Specification

Drawings

1. The drawings were received on 11-24-03. These drawings are not approved. The sheets of replacement drawings use ink which is not black to make corrections.
2. The drawings are objected to under 37 CFR 1.83(a). The drawings must show every feature of the invention specified in the claims. Therefore, the invention as claimed in claims 7, 10, 18, 30 and 33 must be shown or the feature(s) canceled from the claim(s). No new matter should be entered.

A proposed drawing correction or corrected drawings are required in reply to the Office action to avoid abandonment of the application. The objection to the drawings will not be held in abeyance.

3. The drawings are objected to because where is F, see page 13, lines 5-30? Where are 102 and 104, see page 17, lines 2-17? Where is Figure 6A? A proposed drawing correction or corrected drawings are required in reply to the Office action to avoid abandonment of the application. The objection to the drawings will not be held in abeyance.

Claim Rejections - 35 USC § 112

4. Claims 1-4, 7-8, 10-15, 18-19, 23-27, 30-31 and 33-34 are rejected under 35 U.S.C. 112, first paragraph, as failing to comply with the written description requirement. The claim(s) contains subject matter which was not described in the specification in such a way as to

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reasonably convey to one skilled in the relevant art that the inventor(s), at the time the application was filed, had possession of the claimed invention.

The claims now require notches of a width having a range no less than 10mm (all claims), more specifically no less than 15mm (claims 2, 13, 25), or also no greater than about 30mm (claims 4, 15, 27). Applicant refers to page 17, lines 17-24 for support. However, the claimed ranges, i.e. about 10mm or greater, about 15mm or greater and about 10mm to about 30mm, are not disclosed thereby. If Applicants traverse this rejection the specific portion of the description which discloses the claimed notch widths should be set forth. It is noted that page 17, lines 11-15 refer to the depth of the notch not the width of the notch.

Claim Language Interpretation

5. It is noted that while "labial pad" is defined on page 4, lines 20-22 that the claims are drawn to an "absorbent article". "Vestibule" is defined as set forth on page 4, lines 24-31 and page 5, lines 4-6. "Disposition... vestibule" is defined as set forth on page 4, lines 31 et seq, and page 5, lines 10-15 and page 6, lines 1-5. The various directional terms used in the claims are defined as set forth on page 5, lines 16-31. "Notch" is defined as set forth on page 15, lines 1-2 and page 17, lines 25-26 and the claim terminology "extends through an entire z-axis thickness of the absorbent".

Claim Rejections - 35 USC § 102

6. The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.

7. Claims 1-4, 8, 10-15, 19, 23-27, 31, 33-34 are rejected under 35 U.S.C. 102(b) as being anticipated by P & G, PCT '609.

The PG '609 reference, see Figures, teaches an absorbent article 20 comprising an absorbent 22(see page 9, lines 11-12) and 24(see page 17, lines 29-30), having superabsorbent, see page 15, lines 1-16, a fluid permeable cover, see page 18, lines 23-29, and a liquid impermeable baffle, see page 17, last three lines. The absorbent article appears to be configured for disposition within the vestibule as claimed in claims 1, 12 and 24, see claim interpretation section supra, and PG '609, i.e. definition of "interlabial absorbent device" bridging pages 6-7 and the first full paragraph on page 8. The article has a principle longitudinal axis L or x, a principle transverse axis T or y, a z-axis Z, longitudinal sides 24B and transverse end areas adjacent the opposite ends of L or x, and the sides and end areas generally form a periphery as seen from above looking down at the body facing surface.

In regard to claims 1-4, 8, 11-15, 19 and 23, since the length of the portions 24 can be greater than that of portion 22, see Figures again, page 8, lines 15-19, page 10, lines 12-15, page 16, lines 19-24, page 20, third full paragraph, a notch is situated in at least one transverse end area which extends through the entire z-axis thickness, extends inward from the periphery to a depth which depth includes a depth of no less than 10 mm but no greater than about 30 mm. The notch also includes a width, i.e. see width of 22 along T or y and page 8, line 22, which is no less than about 15mm but no greater than about 30 mm.

In regard to claims 10, 24 -27, 31, 33 and 34, since the length of the portions 24 can be less than that of portion 22, see Figures again, page 8, lines 15-19, page 16, lines 19-24, page 20, last paragraph, a notch is situated in both a transverse end area and a longitudinal side, i.e. the

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four corners (see attached Exhibit A), which extends through the entire z-axis thickness, extends inward from the periphery to a depth (DT, DL in Exhibit) which depth includes depth of no less than 10 mm but no greater than about 30 mm, i.e. with respect to the depth as measured from the periphery of the transverse end area, DT, see the portions of '609 cited previously in this sentence and with respect to the depth as measured from the periphery of the longitudinal side, i.e. the distance from 24B to 24A or DL, see page 16, lines 24-29 and thereby page 8, lines 25-27. The notch also includes a width (WT, WL in Exhibit) which is no less than about 15mm but no greater than about 30 mm, i.e. with respect to the width as measured along the periphery of the transverse end area, WT, see width of 22 along T or y and page 8, line 22 and with respect to the width as measured along the periphery of the longitudinal side, WL, see page 8, lines 15-19, page 16, lines 19-24 and page 20, last paragraph. With respect to claims 10 and 24, one of the notches can be considered the notch in the longitudinal side and another one of the notches can be considered the notch in the transverse end area.

The dimensions disclosed by '609 appear to be sufficient to allow the spacing from the perineum or clitoris as claimed in claims 1, 12, and 24, see '609 at portions cited supra. In any case or the second case, with regard to the functions, properties and capabilities set forth in claims 1, 12, and 24, i.e. "being configured... vestibule" and "the depth...when...", see the claim interpretation section supra above and note that the PG device includes the claimed structure. Therefore, there is sufficient factual basis for one to conclude that the functions, properties and capabilities of such claimed structure would also be inherent in the same structure of PG. See MPEP 2112.01. In still another or third case, Applicant discloses the length of the claimed invention is less than or equal to 100 mm, the maximum width is less than or equal to 70 mm, the

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thickness is 0.5 to 10 mm and the notch having a width and a depth no greater than 30mm. The PG reference discloses, at the portions cited above, lengths and widths, and at page 8, lines 25-27 and page 16, lines 29 et seq the thickness, i.e. the depth of portion 22 and the caliper of portion 24, commensurate to those disclosed by Applicant. Therefore, again there is sufficient factual evidence to conclude that the properties, functions and capabilities of such dimensions would also be inherent in the same dimensions of PG. See MPEP 2112.01. It is noted with regard to claims 4, 15 and 27, the claim does not require all the widths or the largest width being no greater than 30 mm.

Claim Rejections - 35 USC § 103

8. The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.

9. Claims 7, 18 and 30 are rejected under 35 U.S.C. 103(a) as being unpatentable over PG '609 in view of PG '075.

Applicants claim the cover encloses the absorbent while PG '609 teaches a topsheet and backsheet on opposite sides of the absorbent. See portions of '609 cited supra. However, PG '075 at page 15, fourth full paragraph teaches the interchangeability of such a configuration in which there is a topsheet on the body facing surface and a backsheet on the opposite surface and a configuration in which the topsheet at least partially wraps the labial device absorbent, i.e. can enclose the absorbent. Therefore, to make the topsheet and backsheet on opposite sides of the absorbent of PG '609 a topsheet which encloses the absorbent instead would be obvious to one

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of ordinary skill in art in view of the interchangeability as taught by PG '075. It is noted that the claims do not require the baffle to be liquid impermeable.

Double Patenting

10. The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. See *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and, *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent is shown to be commonly owned with this application. See 37 CFR 1.130(b).

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

11. Claims 1-4, 7-8, 10-15, 18-19, 23-27, 30-31 and 33-34 are provisionally rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over the claims of copending Application No. 10/036,635 in view of PG '609. Although the conflicting claims are not identical, they are not patentably distinct from each other because since the instant application and the other application were filed on the same day, the one way *In re Vogel* test applies, i.e. are the claims of the instant application obvious in view of the claims of the other application? The answer is yes. The claims of the '635 application include all the structure claimed in the instant application except for 1) axes and a periphery defined by longitudinal sides and transverse end areas, and include 2) ranges of the width of the notch, i.e. less than about 10 mm and 3) thicknesses and basis weights not claimed in the instant claims.

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With regard to 1) the '635 application claims a generally circular geometry and periphery. See PG '609 at page 16, lines 13-19, i.e. a circular geometry and periphery is exchangeable for a geometry and periphery defined by longitudinal sides and transverse end areas and axes, e.g. a rectangle, a trapezoid. To make the circular geometry and periphery of '635 a periphery defined by longitudinal sides and transverse end areas and instead would be obvious to one of ordinary skill in the art in view of the interchangeability as taught by PG '609. With regard to 2), where the general conditions of a claim are disclosed in the prior art, i.e. a notch having a width range which is spaced from the clitoris or perineum, it is not inventive to discover the optimum or workable ranges by routine experimentation, see *In re Allen et al*, 105 USPQ 233. With regard to 3), it is well settled that omission of an element and its function in a combination is an obvious expedient if the remaining elements perform the same functions as before, see *In re Karlson*, 136 USPQ 184.

This is a provisional obviousness-type double patenting rejection because the conflicting claims have not in fact been patented.

Response to Arguments

12. Applicant's remarks with regard to the formalities have been noted but are either deemed moot in that the discussed issues have not been reraised or are deemed not persuasive for the reasons set forth supra. Additionally, contrary to Applicant's remarks none of the Figures show at least one notch 100 in at least one transverse end areas and at least one longitudinal side as claimed in claims 10 and 33. Applicant's remarks with regard to the prior art rejections are deemed moot. See new rejections supra. Applicant's remarks with regard to the double

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patenting rejections and the terminal disclaimers have been noted. However, the language of paragraph 1 after the subheading "Provisional Terminal Disclaimer", i.e. "In the event...", is not deemed proper by the reviewing paralegal since if the application is a good reference it should not matter which issues first.

Conclusion

13. Applicant's amendment necessitated the new ground(s) of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL**. See MPEP § 706.07(a).

Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire **THREE MONTHS** from the mailing date of this action. In the event a first reply is filed within **TWO MONTHS** of the mailing date of this final action and the advisory action is not mailed until after the end of the **THREE-MONTH** shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than **SIX MONTHS** from the date of this final action.

Any new grounds of rejection were necessitated by the addition of the ranges of notch depth and width to the claims.

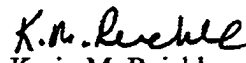
14. Any inquiry concerning this communication or earlier communications from the examiner should be directed to Karin M. Reichle whose telephone number is (703) 308-2617.

The examiner can normally be reached on Monday-Thursday.

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If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, John Calvert can be reached on (703) 308-1025. The fax phone number for the organization where this application or proceeding is assigned is 703-872-9306.

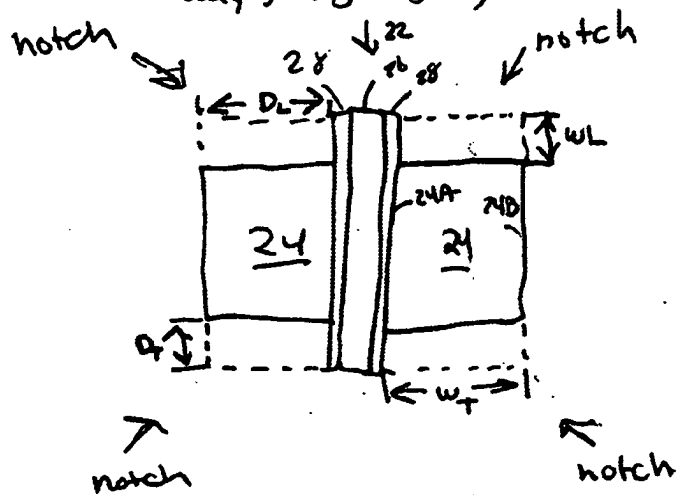
Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).


Karin M. Reichle
Primary Examiner
Art Unit 3761

KMR
February 17, 2004

Exhibit A

(e.g. looking down on
body facing surface)



- W_T - width of notch measured along transverse end area periphery
- D_T - depth of notch measured from transverse end area periphery
- W_L - width of notch measured along longitudinal side periphery
- Q_L - depth of notch measured from longitudinal side periphery